

# DEPARTMENT OF DEFENSE LAW OF WAR MANUAL



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OFFICE OF GENERAL COUNSEL  
DEPARTMENT OF DEFENSE

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17.4.3 Special Courts. As part of its emergency regulations, a State may establish special or emergency courts for cases involving unprivileged belligerents or other persons suspected of committing offenses related to the non-international armed conflict.

Such courts must be regularly constituted and afford all the judicial guarantees that are recognized as indispensable by civilized peoples.<sup>84</sup> Such courts may distinguish based on nationality.<sup>85</sup> The procedures of such courts may deviate from those applicable during ordinary

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<sup>82</sup> For example, David Galula, *Pacification in Algeria, 1956-1958*, 21 (RAND Corporation, 2006) (“In the existing legal framework, proclamation of martial law was the only provision in case of disturbances endangering the security of the state. It would have entailed handing over all powers to the military authority and suspending private and public liberties. Government and Parliament considered this step too extreme. Hence they devised a new contingency, the so-called ‘state of emergency,’ which was declared for the first time for the Constantine area and for Kabylia in April 1955, and was extended to all Algeria in August 1955. Parliament voted a Special Powers Act (with the support of the Communists!), which gave the government a free hand for conducting its policy in Algeria by decree, notably in matters pertaining to economic development, economic and social reforms, territorial reorganization, public order, security of persons and property, and protection of the integrity of the territory. These special powers were vested in the existing government and would lapse with the end of its incumbency; the succeeding government would have to request an extension from the Parliament. The government in turn gave authority to the Minister-Resident (who by then had replaced the Governor General in Algiers) to regulate movements of persons and goods, assign places of residence, create forbidden zones, order searches, ban meetings, control the press, dissolve associations, collect reparations for willful damage and for aid given to the rebels, suspend or transfer civil servants, deprive elected representatives of their seats, postpone by-elections, and delegate certain civil powers to the military. Travel between France and Algeria was made subject to strict control (at least in theory.”); FRANK KITSON, GANGS AND COUNTER-GANGS 44 (1960) (“The legal code in Kenya in October 1952 was not very different from that in England. Certain acts such as theft or murder were illegal and if you committed them you were prosecuted. When the Emergency started some extra laws were made to fit the special circumstances. For example, it became illegal to administer the Mau Mau oath or to carry arms and certain areas of the forest were placed out of bounds. These extra laws, and there were many of them, were known as Emergency Regulations.”).

<sup>83</sup> For example, FRANK KITSON, GANGS AND COUNTER-GANGS 289 (1960) (“No country which relies on the law of

<sup>83</sup> *For example*, FRANK KITSON, GANGS AND COUNTER-GANGS 289 (1960) (“No country which relies on the law of the land to regulate the lives of its citizens can afford to see that law flouted by its own government, even in an insurgency situation. In other words everything done by a government and its agents in combating insurgency must be legal. But this does not mean that the government must work within exactly the same set of laws during an insurgency as existed beforehand, because it is a function of a government when necessary. It does not mean that the law must be administered in exactly the same way during an uprising as it was in more peaceful times, because once again a government has the power to modify the way in which the law is administered if necessary, for the wellbeing of the people, although the exercise of such power is usually – and rightly – subject to considerable constitutional restraint.”).

<sup>84</sup> *Refer to § 8.16 (Criminal Procedure and Punishment).*

<sup>85</sup> *For example*, 10 U.S.C. § 948b (“(a) Purpose. –This chapter establishes procedures governing the use of military commissions to try alien unprivileged enemy belligerents for violations of the law of war and other offenses triable by military commission.”) (emphasis added).

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proceedings, but deviations should be warranted by practical need.<sup>86</sup>